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NOTES.

THE ENTITY THEORY OF PARTNERSHIP UNDER THE BANKRUPTCY ACT OF 1898.—It is now settled that when Congress enacted in 1898 that "'persons' shall include partnerships," § 1 (19), and that "a partnership may be adjudicated a bankrupt," § 5a, it thereby made a partnership a legal entity. *In re Meyer* (1899) 98 Fed. 976; *In re Mercur* (1902) 116 Fed. 655, 658; aff'd. (1903) 122 Fed. 384. Thus, a firm may be declared bankrupt, though one member be a minor, *In re Dunnigan* (1899) 95 Fed. 428, or insane, *In re Stein & Co.* (1904) 127 Fed. 547, and it has even been held that the partnership proceedings and the partners' proceedings are distinct cases, requiring payment of separate fees in each. *In re Barden* (1900) 101 Fed. 553; contra, *In re Gay* (1899) 98 Fed. 870. Acts of bankruptcy by the firm and by the individual partners are clearly distinguished, *Hartman* v. *Peters & Co.* (1906) 146 Fed. 82, and the adjudication is made accordingly.

In re Hale (1901) 107 Fed. 432. In at least one reported case, the issue of the firm's solvency was confined to partnership assets and partnership debts. *In re McMurtrey & Smith* (1905) 142 Fed. 853; Burdick, Part. (2nd Ed.) 306. Merchants have always regarded the firm as something distinct from its members, Burdick, Part. (2nd Ed.) 156, but the Federal judges, schooled in the common-law conception of a partnership as merely an aggregation of individuals, ibid., 81—the doctrine recognized in the Bankruptcy Act of 1867 by § 36—found it difficult, especially at first, to apply the entity theory to all circumstances. This led to the view that a partnership ought not to be adjudicated bankrupt apart from any of its members, *In re Forbes* (1904) 128 Fed. 137, 139, and to theories whereby at least one partner might also be declared bankrupt. *Chemical Nat. Bank* v. *Meyer* (1899) 92 Fed. 896. Further to avoid the bankruptcy of merely the partnership entity, with all its difficulties, *In re Carleton* (1902) 115 Fed. 246, 249, the courts at this period held, in disregard of the entity theory, that a firm was insolvent only when its property, plus the individual property after the payment of individual debts, was less than its debts. *In re Blair* (1900) 99 Fed. 76. The reason given, that each individual partner as well as the firm was liable for partnership debts, *Vaccaro* v. *Security Bank* (1900) 103 Fed. 436, practically ignored the force of § 1 (15) and § 1 (19) of the Act, and the fact that a person is none the less insolvent if some one else is liable for his debts and able to pay them. Apparently, what underlay these decisions was the hidden fear lest a too strict application of the entity theory might result in merely distributing firm property among firm creditors, and then wiping the firm debts out of existence by a firm discharge, see *In re Pincus* (1906) 147 Fed. 621, 625—a conclusion clearly wrong but never called for by the entity theory under the statute. Accordingly, General Order VIII and Official Form No. 2 of the Supreme Court required the filing of individual schedules of the partners upon a voluntary petition in bankruptcy by a firm; this, however, is reconcilable with the entity theory on the ground that the schedules of the partners, like the examination of each of them by the creditors, are necessary for the proper administration of the partnership estate. In the leading case of *In re Meyer, supra,* the Circuit Court of Appeals for the Second Circuit, while deciding that proof of a partnership act of bankruptcy will not *per se* sustain the adjudication of an individual partner, first suggested the rule that an adjudication of the partnership entity nevertheless drew into the court of bankruptcy the administration of the estates of the individual partners, notwithstanding that there had been no individual adjudications. This dictum has been widely followed, especially in the Eastern Circuits. *In re Stokes* (1901) 106 Fed. 312. Recently, however, the Circuit Court of Appeals for the Eighth Circuit, in a case wherein a partnership had made a general assignment and had been adjudged a bankrupt, without any of the partners being adjudicated, held that the partnership trustee could not take nor administer the property of an individual partner. *In re Bertenshaw* (1907) 157 Fed. 363. The court, while recognizing contrary dicta and decisions in other circuits, placed its decision upon a logical analysis of the Act. An affirmance of this view by the

Supreme Court, settling the law in the other circuits in accord, would be desirable.

There is no express provision of the statute allowing individual property to be taken by the trustee upon a firm bankruptcy. § 5c does provide that "the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property," but this ought to be read with §§ 2 (1) and 32 and General Order VI, and its purpose is apparently to have the cases of the partnership and all the partners administered for the sake of convenience in one district. Collier, Bank. (6th Ed.) 82. As to partners not adjudicated, the power of the court certainly ought to go no further than jurisdiction of their persons to compel compliance with § 7 (Duties of Bankrupts). The statute, although considering the firm an entity for bankruptcy purposes even after dissolution, § 5a, nevertheless recognizes the common-law rule that the bankruptcy of a partner works for all other purposes a dissolution of the firm, Burdick, Part. (2nd Ed.) 343, and provides for the trustee's receiving the bankrupt's interest in the firm after liquidation and accounting by the non-bankrupt partner or partners; § 5h; but this does not by any implication give the trustee of the bankrupt partner the power to take the firm's property, *In re Mercur* (1903) 122 Fed. 384, nor that of the other partners. Cf. *Amsinck* v. *Bean* (1874) 22 Wall. 395. Similarly, there is no reason in allowing the property of a non-bankrupt partner to be taken upon an adjudication of the partnership entity.

On the other hand, wherever *In re Meyer, supra,* is followed, the distinction between acts of bankruptcy by the partnership and such acts by the partners, while still important upon the question of adjudication, *Hartman* v. *Peters & Co., supra,* becomes practically immaterial as to administration and discharge. *Dickas* v. *Barnes* (1905) 140 Fed. 849. Although both firm and individual property is thus taken and administered in the firm proceeding, the discharge, despite some dicta, seems never to have been granted to the firm only, but invariably to the individual partners. *In re Farley* (1902) 115 Fed. 359. Because of these decisions, and since in practice a firm is not likely to get into bankruptcy if any partner is solvent, it has become the most usual practice to adjudicate the firm and all the individual partners, *In re Forbes, supra; In re Grant Bros.* (1901) 106 Fed. 496, 498; Collier, Bank. (6th Ed.) 80, to marshal the assets of all and distribute them as provided by § 5f of the Act, and then to discharge the individual partners from firm and individual debts. *In re Meyers* (1899) 97 Fed. 757; *In re Gay, supra,* 872.

Many of the difficulties of the subject may be removed if we adopt the theory that the partnership and the partners are distinct legal persons as regards adjudication and administration, but that a discharge (even from partnership debts), to be of any effect, can be granted only to the individual partners. As the application for a discharge is substantially a separate proceeding, this rule would be convenient in its workings and logical in its results. If one member of a firm commits an individual act of bankruptcy, the other members may liquidate, § 5h, and firm creditors can be

paid so far as possible in the liquidation proceedings. They may also prove their claims against the bankrupt, *In re Bates* (1900) 100 Fed. 263, although they cannot receive any dividend until after the individual creditors have been paid in full; § 5f; *In re Wilcox* (1899) 94 Fed. 84; *In re Janes* (1904) 133 Fed. 912. The discharge is, according to the best authority, a valid bar to partnership and individual obligations. *N. Y. Institution* v. *Crockett* (N. Y. 1907) 117 App. Div. 269; 7 COLUMBIA LAW REVIEW 272. On the other hand, if the firm commits an act of bankruptcy, the partnership entity is adjudicated "a bankrupt," § 5a; the partnership creditors elect the trustee, § 5b [for § 5h seems applicable only to the bankruptcy of a partner when the firm is not declared a bankrupt, *In re Harris* (1900) 4 Am. B. R. 133; Collier, Bank. (6th Ed.) 87]; the partnership assets are collected, and the partnership debts are paid. The discharge of the partnership entity would be a nullity, *Chemical Nat. Bank* v. *Meyer, supra,* 899; *In re Forbes, supra,* 140, for the partners, whether regarded as co-debtors with their firm, or as quasi-sureties for its debts, would still be liable by virtue of § 16. The result would be much like the bankruptcy of a corporation whose stockholders are under a statutory liability for its debts. See § 4b. The net result of a partnership bankruptcy, then, would be an administration of its estate; the partners must then either pay off what remains of its indebtedness, or if unable to do so become voluntary bankrupts; or the partnership creditors, who are their individual creditors also, may cause them to be adjudicated involuntary bankrupts. *Matter of Hee* (1904) 13 Am. B. R. 8.

DISPOSITION OF ACCUMULATIONS UNDER NEW YORK STATUTES.—In determining the person to whom, as "presumptively entitled to the next eventual estate," the rents and profits of realty or the income of personal property should belong where they were undisposed of, and no valid direction for their accumulation was given, 1 R. S. 726, § 40; Laws 1896 c. 547, § 53; 1 R. S. 773, § 2; Laws 1897 c. 417, § 2; *Cook* v. *Lowry* (1884) 95 N. Y. 103; and see 7 COLUMBIA LAW REVIEW 403, the court in *Manice* v. *Manice* (1871) 43 N. Y. 303, 385, said: "The statute does not say the ultimate, but the next eventual estate. That is, the estate which is to take effect upon the happening of the event which terminates the accumulation." Unless the word "presumptively" is to be nullified, and since the person presumptively entitled can take the accumulations at once as they accrue, *Manice* v. *Manice, supra,* 385; *Matter of Crossman* (1889) 113 N. Y. 503, "the presumption must be determined as of the present moment, i. e. the court must decide who would take the next eventual estate if the contingency happened now." 7 COLUMBIA LAW REVIEW 403. Where there is one contingency only, and where, assuming it to happen now, no supposition need be indulged in favor of one of several adverse claimants of the next eventual estate, there is no difficulty in determining the person presumptively entitled. *Manice* v. *Manice, supra; Pray v. Hegeman* (1883) 92 N. Y. 508; *Delafield* v. *Shipman* (1886) 103 N. Y. 463; 7 COLUMBIA LAW REVIEW 403; and see *Cochrane* v. *Schell* (1894) 140 N. Y. 516. If, however, the determination of the person entitled depends upon a choice